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No. 83-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF ARIZONA,
Petitioner,

v.

DENNIS WAYNE RUMSEY,
Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does the Arizona capital sentencing procedure resemble a trial, thus rendering a life sentence an implicit acquittal of the death penalty, which would bar a subsequent imposition of the death penalty on double jeopardy grounds?

When all factual issues were resolved against the state at a capital sentencing proceeding which resembled a trial, and when the defendant does not win a retrial, is the state precluded by the Double Jeopardy Clause from conducting a second capital sentencing hearing in an effort to relitigate those facts which were resolved against it at the first hearing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
POINT I The Double Jeopardy Clause Is Applicable To The Imposition Of Sentence When The Procedure Used To Arrive At That Sentence Resembles A Trial	8
POINT II The Resolution Of Factual Issues In The Present Case Does Not Distinguish It From Bullington v. Missouri	12
POINT III There Are No Differences Between The Arizona And Missouri Death Sentencing Procedures Which Are Significant To The Issue Presented Herein	14
POINT IV The State Of Arizona Did Not Prove Its Case At The Original Sentencing Hearing	24
POINT V Bullington v. Missouri Should Not Be Overruled	24
CONCLUSION	28
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Addington v. *Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 26

Arizona v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 9

Bullington v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) ..... *passim*

Burks v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) 9

Chaffin v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) 11, 27

Ex parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874) ... 10

Fong Foo v. *United States*, 369 U.S. 141, 82 S.Ct. 67, 7 L.Ed.2d 629 (1962) 9

Green v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) 9, 26

North Carolina v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) 4, 11, 17, 27

State v. *Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982) ... 13

State v. *Clark*, 126 Ariz. 428, 616 P.2d 888 *cert. denied*, 499 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980) 3, 4, 13

State v. *Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980) ... 16

State v. *Leslie*, 136 Ariz. 463, 666 P.2d 1072 (1983) ... 16

State v. *McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980) . 16

State v. *Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981) 23

State v. *Rumsey*, 130 Ariz. 427, 636 P.2d 1209 (1981) . 3

State v. *Rumsey*, 136 Ariz. 166, 655 P.2d 48 (1983) 4, 12, 21, 22

State v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978) .. 10

Stroud v. *United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919) 11, 24, 27

United States v. *Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896) 8

United States v. *DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) 6, 8, 10, 11, 17, 18, 19, 20, 21

Table of Authorities Continued

Page

United States v. *Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) 8, 9

United States v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) 9, 24

Whalen v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) 11

Arizona Revised Statutes

§ 13-604 23
§ 13-701 23
§ 13-702 22
§ 13-702(D) 23
§ 13-702(D)(6) 13
§ 13-702(D)(9) 13
§ 13-703 ..... 2, 4, 12, 15, 22, 1a
§ 13-703(A) 15, 1a
§ 13-703(B) 16, 1a
§ 13-703(C) 16, 17, 1a, 2a
§ 13-703(D) 16, 2a
§ 13-703(E) 4, 15, 2a
§ 13-703(F) 15, 26, 3a
§ 13-703(F)(4) 3
§ 13-703(F)(5) 3, 4, 13
§ 13-703(G) 15, 2a
§ 13-1105 ..... 1a
§ 13-4032(4) 3
§ 13-4032(6) 23

17 A.R.S., Rules of Criminal Procedure

Rule 26.14 4
Rule 31.2(6) 21
Rule 31.7 4

Mo. Rev. Stat.

§ 565.012.2 26

United States Constitution

Fifth Amendment 5
Fourteenth Amendment 5

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Dennis Rumsey was charged by an Information filed December 6, 1979, with Armed Robbery and First Degree Murder.

At trial, one Kimberly Holmes testified that in October, 1979, she and Respondent were hitchhiking to Respondent's parents' home in Las Vegas. They were picked up by the victim, George Koslosky, in New Mexico or Texas. They stopped in Phoenix, where Respondent and the victim went into a store to buy some beer. Upon returning to the automobile, Respondent told his companion that the victim had over three hundred dollars ($300.00), and that he was going to rob the victim. Upon leaving Phoenix, Respondent was driving and the victim

was sleeping in the back. After driving approximately forty-five minutes, Respondent pulled over to the side of the road, and awakened the victim. He ordered the victim at gunpoint to empty his pockets and get into the trunk. The victim refused, and Respondent eventually shot the victim twice and dragged him to the side of the road. (Reporter's Transcript, June 3, 1980, pp. 22-70).

Respondent testified in his own behalf that he had never discussed robbing George Koslosky. Upon leaving Phoenix, he testified, the victim was driving the car, and Respondent passed out in the back seat from consuming alcohol and depressant drugs. Some time later, he awoke to find Kimberly driving the car, shaking and crying. She told him she had shot the victim because he had tried something with her when she had stopped the car to get aspirin from the trunk. Respondent admitted having told his brother in Las Vegas that it was he who shot the man, but explained that he had only done so to prevent Kimberly from being charged. (Reporter's Transcript, June 3, 1980, p. 118-June 4, 1980, p. 72).

On June 6, 1980, Respondent was convicted of Armed Robbery and First Degree Murder. On July 3, 1980, the trial court conducted a sentencing hearing as required by A.R.S. § 13-703. (J.A. 1-52). In its effort to prove aggravating circumstances, the state relied on evidence already presented at trial. Respondent called as a witness the foreman of the trial jury, who testified that the jury had rejected the premeditation theory, and had convicted Respondent based on the felony-murder rule, and that most of the jurors felt a life sentence was appropriate. (J.A. 3-9).

On July 7, 1980, the trial court announced its special verdict, finding that there were no aggravating and no mitigating circumstances. (J.A. 53-58). Specifically, the

trial court found that the offense was not committed as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value. A.R.S. § 13-703(F)(5). (J.A. 54-55). The trial court stated it disagreed with the position the state took at the sentencing hearing, and stated that when § 13-703(F)(5) is read together with § 13-703(F)(4), it is meant to apply to contract-type killings, not to killings during robberies. (J.A. 55).

Because the trial court found that no aggravating circumstances were proven, the court was required to impose a sentence of life imprisonment without parole for twenty-five years. The trial court also imposed a sentence of twenty-one years on the armed robbery charge, to run consecutively to the sentence imposed on the murder. (J.A. 72-73).

Respondent appealed, arguing that the imposition of consecutive sentences was improper; the state cross-appealed, arguing that the trial court erred in ruling on a question of law by finding A.R.S. § 13-703(F)(5) inapplicable to Respondent's case.[1] The consecutive sentences were affirmed by the Arizona Supreme Court. *State* v. *Rumsey*, 130 Ariz. 427, 636 P.2d 1209 (1981). The court further ruled that, based on *State* v. *Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), which was decided eighteen days after Respondent's sentencing, the trial court had erred in ruling that A.R.S. § 13-703(F)(5) only applied to murder for hire situations. *(Id.)* The sentence of life imprisonment on the murder charge was set aside, and the matter remanded for redetermination of aggravating and

[1] The cross-appeal was taken under A.R.S. § 13-4032(4) which permits the state to appeal from, "A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment."

mitigating circumstances and resentencing on that charge.[2]

On remand, the trial court held another sentencing hearing under A.R.S. § 13-703. (J.A. 75-117). No further evidence was presented, both parties relying on the evidence presented at trial and the first sentencing hearing. Respondent argued that this Court's opinion in *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prohibited the trial court from imposing the death penalty after having previously sentenced Respondent to life. (J.A. 99-102). Respondent also argued that the imposition of a sentence of death would violate 17 A.R.S., Rules of Criminal Procedure, rule 26.14, and *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). On February 4, 1982, the trial court announced its finding that the only aggravating circumstance was that the offense was committed for pecuniary gain under A.R.S. § 13-703(F)(5). (J.A. 119-120). The trial court found no mitigating circumstances (J.A. 121-124), and ordered that Respondent suffer the penalty of death as required under A.R.S. § 13-703(E). (J.A. 135).

The death sentence was appealed automatically under 17 A.R.S., Rules of Criminal Procedure, Rule 31.7. A number of issues were raised by Respondent on appeal; however, the Arizona Supreme Court limited its discussion to whether the Arizona capital sentencing procedure is effectively a trial. *State* v. *Rumsey*, 136 Ariz. 166,

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[2] Justice Gordon dissented from the holding in *Clark* on the issue in question on the same reasoning the trial court used herein. The decision in *Rumsey* which set aside the life sentence and remanded for resentencing was essentially a three to two decision. Justice Gordon specially concurred based on his dissent in *Clark*. Chief Justice Struckmeyer dissented on the ground that such a ruling would have a chilling effect on the right to appeal.

655 P.2d 48 (1983). The court found that it is, and that under *Bullington* v. *Missouri*, *supra*, Respondent's original life sentence amounted to an acquittal of the death penalty. *(Id.)* A subsequent sentence of death, the court held, would violate the double jeopardy provisions of the Fifth Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects a defendant who has been acquitted from reprosecution for the same offense. This applies to implicit acquittals, and applies even though the acquittal may have been erroneously entered. Although government appeals are not totally prohibited, the government may not appeal when a defendant is acquitted, no matter how erroneous the acquittal.

Although this Court has generally declined to apply the Double Jeopardy Clause to the mere imposition of a sentence less than the maximum, the Court has afforded such protection when the sentencer has the choice of life or death, and that choice depends upon the result of a fact-finding proceeding which resembles a trial on guilt or innocence. *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). That situation exists in the present case.

The present case is not distinguishable from *Bullington* either on the basis that the resolution of facts at the sentencing hearing was different, or on the basis that the procedures used were significantly different. Contrary to Petitioner's position, the facts resolved at the sentencing hearing were resolved against the state, as they were in *Bullington*. In fact, because of the precision of the special

verdict in Arizona, and because in Arizona the death penalty is mandatory if the state proves its case, it is even more clear in the present case than it was in *Bullington* that the factual issues were resolved against the state.

The major factors which make the Missouri procedure resemble a trial are: (1) The finder-of-fact/sentencer has the choice between two alternatives rather than a broad range of choices; (2) There are specific standards which govern that choice; and (3) The burden is upon the state to prove certain facts beyond a reasonable doubt in its quest for the harsher sentence. The Arizona procedure includes those major factors.

None of the distinctions between the Arizona and Missouri death penalty procedures are significant. Those differences which do exist do not make the Arizona procedure less like a trial than the Missouri procedure. In fact, some of those distinctions actually make the Arizona procedure more like a trial.

The sentencing procedure in the present case is distinguishable in every significant respect from *United States* v. *DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), in which this Court allowed a government appeal from a sentence. Any similarities betwen this case and *DiFrancesco* are also shared with *Bullington*, and do not diminish the resemblance of the procedure herein to a trial. Furthermore, the factual issues in the sentencing hearing in *DiFrancesco* were resolved against the defendant, thus he was found to be subject to a harsher penalty. In the present case, the opposite was true.

If a sentence of life is imposed at the conclusion of the Arizona sentencing procedure, that special verdict is final. Only if the death penalty is imposed is there an auto-

matic appeal and review of the sentence. Contrary to Petitioner's claim, the Arizona death penalty sentencing procedure does not resemble the sentencing procedure used in non-capital cases in any significant way.

The State of Arizona did not prove its case at the original sentencing hearing. There was no verdict in favor of the state which could be reinstated after the state's cross-appeal. Not only did the court have to conduct a second hearing to give the state the opportunity to prove the aggravating circumstance which was disputed on appeal, but the state also took that opportunity to try once again to prove two other aggravating circumstances which the court had found at the first hearing did not exist.

Bullington v. *Missouri*, *supra*, should not be overruled because it is not in fact at odds with previous double jeopardy law. Although previously this Court has declined to extend double jeopardy protection to the imposition of sentence, *Bullington* and the present case do not involve the mere imposition of sentence. They involve a fact-finding proceeding which resembles a trial, and after which the death penalty may not be imposed unless the state has proven certain facts beyond a reasonable doubt. This stands in stark contrast to the usual sentencing decision, which is essentially unguided regarding precisely which sentence, within a range of sentence, must be imposed on a particular defendant in a particular case.

The evils against which the Double Jeopardy Clause is designed to protect exist at a retrial of this sentencing issue just as they would at any retrial. There is the risk that ultimately, with repeated attempts by the state, an individual who is not guilty of those facts necessary for the death penalty may be found guilty of them. Certainly,

a retrial of the capital sentencing procedure involves the same embarrassment, expense, ordeal, anxiety and insecurity as any retrial would.

In the present case, the reasons for the application of the Double Jeopardy Clause are even stronger than those in *Bullington*, and thus it presents an inappropriate vehicle for reconsidering that case.

ARGUMENT

After Respondent's conviction for murder, first degree, a mandatory sentencing hearing was held. That hearing resembled a trial. Four days later, the court issued its special verdict, which resolved factual issues against the state, acquitting Respondent of those things required to be proven before the death penalty may be imposed. The issue presented is whether it is a violation of the Double Jeopardy Clause for the state to subject Respondent to a second prosecution of the death penalty sentencing hearing in an effort to prove those factual issues which were resolved against it at the first hearing.

POINT I

The Double Jeopardy Clause Is Applicable To The Imposition Of Sentence When The Procedure Used To Arrive At That Sentence Resembles A Trial

This Court has on numerous occasions summarized the history of the Double Jeopardy Clause, and its various applications. See *United States* v. *DiFrancesco*, 449 U.S. 117, 126-131, 101 S.Ct. 426, 431-434, 66 L.Ed.2d 328 (1980); *United States* v. *Scott*, 437 U.S. 82, 87-92, 98 S.Ct. 2187, 2192-2194, 57 L.Ed.2d 65 (1978). The Double Jeopardy Clause protects a defendant who has been acquitted from being prosecuted again for the same offense. *United States* v. *Ball*, 163 U.S. 662, 16 S.Ct 1192, 41

L.Ed. 300 (1896). If a defendant is convicted, but has his conviction overturned on appeal or in other post-conviction proceedings, the Double Jeopardy Clause does not forbid a retrial, unless the reversal was won because the evidence was insufficient. *Id.*; *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). When a defendant is convicted of a lesser included offense of the offense charged, there is an implicit acquittal of the greater offense, and reversal of the conviction would allow a retrial only as to the lesser offense. *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A necessary corollary of the finality of an acquittal established in *Ball*, *supra*, is that an acquittal, even though erroneously entered, may not be reviewed on appeal. *Arizona* v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *Fong Foo* v. *United States*, 369 U.S. 141, 82 S.Ct. 67, 7 L.Ed.2d 629 (1962).

Petitioner points out that appeals by the government are not altogether prohibited by the Double Jeopardy Clause, citing several cases which illustrate circumstances under which such appeals are permitted. As will appear throughout the following arguments, the cases cited by Petitioner are all distinguishable from the present case. In *United States* v. *Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), the government sought to appeal from a dismissal which was not based upon the merits of the case, and which occurred prior to the submission of the matter to the finder of fact for a verdict. In *United States* v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), the government was permitted to appeal from a judgment of acquittal entered after the jury had returned a verdict of guilty. The government is also permitted to appeal from a sentence when the procedure used to arrive at that sentence does not bear the signifi-

cant hallmarks of a trial, and where such an appeal is specifically provided for in the statutes which authorized the penalty. *United States* v. *DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). However, Petitioner concedes, as he must, that the government is precluded from appealing when a defendant is acquitted, regardless of the errors which may have been committed up to that point.

Although the precise issue presented herein was first presented to this Court only recently in *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the application to sentencing of the protections of the Double Jeopardy Clause is not a novel idea. It was stated in *Ex parte Lange*, 18 Wall., 163, 21 L.Ed. 872 (1874), "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." 18 Wall. at 169, 21 L.Ed. 872.[3] Contrary to what is implied by Petitioner, *Lange* does not stand for the proposition that a sentence may be increased during the same term of court. It has been said of *Lange:*

> As is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a de-

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[3] Nor is the application of the Double Jeopardy Clause to sentencing an idea that is novel to the Arizona Supreme Court. In *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), the defendant, whose original death sentence was set aside on appeal, claimed that the imposition of the death penalty at his resentencing constituted double jeopardy. The Arizona Supreme Court disagreed, but stated that had the defendant begun to serve a life term in place of the original death sentence, double jeopardy considerations would have prevented the later imposition of the death penalty. 120 Ariz. at 453, 586 P.2d at 1265.

> fendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature. [Citations omitted.]
>
> *Whalen* v. *United States*, 445 U.S. 684, 703, 100 S.Ct. 1432, 1443, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting).

But see *United States* v. *DiFrancesco*, *supra*, at 138-139, 101 S.Ct. at 438.

As Petitioner points out, this Court has on a number of occasions declined to apply double jeopardy protection to a sentence which is less than the maximum. *United States* v. *DiFrancesco*, *supra*; *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Stroud* v. *United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919). However, each of those cases is distinguishable from the present case because the sentencing procedure used herein was significantly different from those employed in the above referenced cases. See *Bullington* v. *Missouri*, *supra*, at 438-440, 101 S.Ct. at 1857-1859.[4] In *Bullington*, this Court recognized it was dealing with a sentencing procedure which was very different from those previously considered by the Court. The capital sentencing procedure in *Bullington*, the Court held, bears the significant hallmarks of a trial on the question of guilt or innocence, thus a sentence—or verdict—of life imprisonment is an acquittal as to the death penalty, and must be accorded the same finality as any other acquittal.

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[4] In addition, in *Chaffin*, *Pearce* and *Stroud*, the defedants each won a retrial either on appeal or in other post-conviction proceedings. Respondent did not win a retrial, nor did he win anything at all on appeal. Thus, the present case does not even call into play the general rule that a harsher sentence may be imposed on retrial.

In the case presently before this Court, the Arizona Supreme Court, in its unanimous opinion, stated:

> In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to a trial is apparent on examination of A.R.S. § 13-703.
>
> *State* v. *Rumsey*, 136 Ariz. at 171, 665 P.2d at 53. (Page A-13 of Appendix to Petition).

The Arizona Supreme Court specifically held that the Arizona capital sentencing procedure before the trial court "resembles a trial on the issue of life or death." 136 Ariz. at 173, 665 P.2d at 55 (page A-22 of Appendix to Petition).

Although it was essentially the Arizona Supreme Court's own analysis which led to that conclusion, the Court did make comparisons to *Bullington* v. *Missouri*, *supra*, and addressed the differences in the procedures pointed out by the state before that court. The Arizona court concluded that there were no significant differences between the two procedures. 136 Ariz. at 174, 665 P.2d at 56, (page A-25 of Appendix to Petition).

POINT II

The Resolution Of Factual Issues In The Present Case Does Not Distinguish It From Bullington v. Missouri

Petitioner states that the present case is distinguishable from *Bullington* because the trial court herein did not resolve factual issues against the state. Petitioner further claims that the trial court found that the murder was committed for pecuniary gain, but refused to apply that aggravating circumstance in determining sentence. Respondent submits that Petitioner's claims in this regard are unsupported, and are in fact contradicted by the record. The disputed aggravat-

ing circumstance concerns whether or not, "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). In the initial special verdict, the trial court specifically found:

> 5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> (J.A. 54).

The court gratuitously added that it disagreed with the state's interpretation of A.R.S. § 13-703(F)(5), stating that the aggravating circumstance describes only murders for hire.[5] The trial court imposed a sentence of life imprisonment, without parole for twenty-five years, at the initial sentencing. (J.A. 64).[6] Regardless of whether the factual issue to be resolved at the sentencing hearing is considered to be the existence or non-existence of aggravating circumstances, or whether the sole factual issue is the imposition of a life sentence versus the death penalty, it is clear that in either event, the factual issue

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[5] The sentencing judge is not alone in his interpretation of A.R.S. § 13-703(F)(5). Two members of the five member Arizona Supreme Court have since agreed with the precise reasoning expressed by the sentencing judge. *State* v. *Blazak*, 131 Ariz. 598, 643 P.2d 694, 701 (1982) (Gordon, J., specially concurring; Cameron, J., explanatory note); *State* v. *Clark*, 126 Ariz. 428, 616 P.2d 888, 897 (1980) (Gordon, J., specially concurring).

[6] Petitioner also implies that in order to enhance Respondent's robbery sentence, the trial court found that the robbery was committed "for pecuniary gain." (Brief for Petitioner, p. 14, footnote 8). In fact, the trail court did not mention the term "pecuniary gain," and did not mention the statute number, A.R.S. § 13-702(D)(6), which deals with pecuniary gain, in enhancing that sentence. (J.A. 66). Instead, the court found the aggravating circumstances for the robbery under A.R.S. § 13-702(D)(9), which allows the court to consider anything it deems appropriate to the ends of justice. *(Id.)*

was resolved against the state at the initial sentencing proceeding.

The situation herein is not unlike that which might occur in a trial to the court on the issue of guilt or innocence, where the trial court, at the close of the evidence, enters a verdict of acquittal, and then states that he believes the statute was intended to cover a different sort of factual situation. The state would be prohibited by the Double Jeopardy Clause from appealing from that acquittal, even though the state believed that their supreme court might later disagree with the trial judge's application of the statute.

Petitioner states that in *Bullington*, factual issues were resolved against the state at the initial sentencing. In fact, because *Bullington* involved only a general verdict of life, without reference to the existence or nonexistence of aggravating circumstances, and because the jury in Missouri is permitted to choose life imprisonment even though the state has fully proved its case, there is no way of knowing whether any underlying factual issues were in fact resolved against the state in *Bullington*. *Bullington* v. *Missouri*, 451 U.S. at 452, 101 S.Ct. at 1865 (footnote 4) (Powell, J., dissenting). Thus, if there is any distinction between *Bullington* and the present case regarding factual resolutions, it operates in favor of finding even greater reasons to apply the Double Jeopardy Clause in the present case than existed in *Bullington*.

POINT III

There Are No Differences Between The Arizona And Missouri Death Sentencing Procedures Which Are Significant To The Issue Presented Herin

This Court stated in *Bullington* v. *Missouri:*

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner

> Bullington at his first trial . . . differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts.
>
> 451 U.S. at 438, 101 S.Ct. at 1858.

Thus, the Missouri capital sentencing procedure resembles a trial because it includes three essential components: (1) The finder-of-fact/sentencer has the ultimate choice between only two alternatives, rather than a wide range of choices; (2) Specific standards guide the making of that choice; and (3) The burden is upon the state to prove certain facts beyond a reasonable doubt in its quest for the harsher result.

In all relevant respects, the Arizona capital sentencing procedure closely resembles that of Missouri.[7] The Arizona capital sentencing procedure allows a choice between only two alternatives.[8] The court does not have unbounded discretion to select from a wide range of possible punishments. At the sentencing hearing required by Arizona law, the court must apply certain standards in making the choice between life and death.[9] The prosecution

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[7] A.R.S. § 13-703.

[8] A.R.S. § 13-703(A).

[9] A.R.S. § 13-703(E), (F) and (G).

has the burden, at that sentencing hearing, of establishing certain facts (aggravating circumstances) beyond a reasonable doubt before the death penalty may be imposed. *State* v. *Jordan*, 126 Ariz. 283, 614 P.2d 825, 828 (1980). Furthermore, the admissibility of evidence regarding those facts which the prosecution must prove is governed by the same rules which govern the admission of evidence at trial.[10] The trial court in Arizona is even required to return a "special verdict" setting forth its findings as to aggravating and mitigating circumstances.[11]

Petitioner points out a number of differences between the Arizona and Missouri sentencing procedures. Respondent submits that those differences are not significant to the issue presented herein. Several of those differences were specifically discussed by the Arizona Supreme Court, and were not considered by that court to be sufficient to preclude a finding that the Arizona procedure resembles a trial. Petitioner first discusses the fact that the Arizona sentencing hearing is conducted before the judge rather than the jury.[12] Were this difference significant to the application of the Double Jeopardy Clause, then it would logically follow that trials to the court on the issue of guilt or innocence would, as far as Double Jeopardy considerations are concerned, be treated differently than trials to a jury. This, of course, is not the law.

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[10] A.R.S. § 13-703(C).

[11] A.R.S. § 13-703(D).

[12] It is noteworthy that the law in effect at the time of Respondent's sentencing required the sentencing hearing to be conducted by the judge who presided over the trial. A.R.S. § 13-703(B). If that judge were unable, for whatever reason, to preside, no other judge could replace him. *State* v. *Leslie*, 136 Ariz. 463, 666 P.2d 1072 (1983); *State* v. *McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980).

Whether a defendant waives a trial by jury, or is simply not entitled to one by law, he is still entitled to the protections of the Double Jeopardy Clause. Both *United States* v. *DiFrancesco*, *supra*, and *North Carolina* v. *Pearce*, *supra*, involved sentencings by the judge rather than the jury. However, in distinguishing those cases from the situation presented in *Bullington*, this Court never commented on the lack of jury participation in the sentencing as a significant distinguishing characteristic. 451 U.S., at 439-441, 101 S.Ct., at 1858-1859.

Petitioner states that closing arguments are provided for by statute in Missouri, but not in Arizona. In fact, the Arizona statute provides, in pertinent part:

> The prosecution and defendant . . . shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section.
>
> A.R.S. § 13-703(C).

Petitioner points out that instructions are given to the jury in Missouri, but there are no instructions in Arizona. This, of course, is true of any trial to the court.

Petitioner notes that in Missouri, the rules of evidence apply to both aggravating and mitigating evidence, but that in Arizona they apply only to evidence regarding aggravating circumstances. The Arizona Supreme Court held that this was not a significant distinction. 136 Ariz. at 172, 665 P.2d at 54 (pages A-16 to A-17, Appendix to Petition). Respondent submits that what is important in this regard is that the information concerning aggravating circumstances—without proof of which the death penalty may not be imposed—is subject to the rules of evidence, implying that the risk of error is to be borne by the state, not the defendant.

Further, Petitioner observes that the Missouri jury must, once it finds aggravating circumstances, be convinced beyond a reasonable doubt that these circumstances warrant the death penalty, while the Arizona judge need not be so convinced. Respondent submits that this distinction merely reflects the Arizona legislature's determination that any aggravating circumstance warrants the death penalty, if there are not sufficiently substantial mitigating circumstances. This is similar to the legislature's power to determine which elements are required for conviction of a substantive crime, and in no way diminishes the resemblance of Arizona's sentencing procedure to a trial.

Finally, Petitioner focuses on the fact that even when a Missouri jury determines that the state has prevailed in all respects regarding the factual issues to be determined, the jury may still refuse to impose the death penalty. Petitioner correctly states that in Arizona, the death penalty is mandatory when the state proves any aggravating circumstance, and there are no sufficiently substantial mitigating circumstances. This clearly makes the Arizona procedure more closely resemble a trial than does the Missouri procedure. *Bullington* v. *Missouri*, 451 U.S. at 452, 101 S.Ct. at 1865 (footnote 4) (Powell, J., dissenting). Never in a trial on the issue of guilt or innocence is a jury instructed that even though they find the state has proven its case, they may nonetheless acquit the defendant.

Petitioner goes to great lengths to make it appear that the Arizona capital sentencing procedure resembles the procedure used in *United States* v. *DiFrancesco*, *supra*, rather than the one used in *Bullington* v. *Missouri*, *supra*. (Brief for Petitioner, pp. 24-26). In fact, Petitioner's contention does not withstand close scrutiny.

Petitioner discusses the chronology of the Arizona procedure, making comparisons to *DiFrancesco*. Petitioner states that a "typical" Arizona capital sentencing hearing begins with the prosecutor listing the evidence from the trial on guilt or innocence, which the prosecutor contends shows aggravating circumstances, and Petitioner likens that procedure to *DiFrancesco*. Assuming that a "typical" Arizona sentencing hearing begins in that way, there is no doubt that the same thing occurred in the Missouri hearing in *Bullington*. (Joint Appendix in *Bullington* v. *Missouri*, p. 61). One of the allegations against *Bullington* was that, "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." 451 U.S., at 435, 101 S.Ct., at 1856. Such an allegation could not be proved without reference to the evidence at trial.

Petitioner argues that another similarity between Arizona's procedure and that in *DiFrancesco* is that certified copies of prior convictions may be introduced by the state.[13] Again, this is also true of the Missouri procedure. 451 U.S., at 433, 101 S.Ct., at 1855 (footnote 4).

Although, as Petitioner states, a defendant in Arizona may attack the showing of aggravation, as the defense did in *DiFrancesco*, it is again difficult to imagine how this is different from the Missouri procedure. The defense in *Bullington* no doubt did its best to attack the showing of aggravation in that case.

The *DiFrancesco* case was distinguished by this Court in *Bullington* v. *Missouri*, *supra*, on several grounds, all of which apply equally to the present case: The procedure at issue in *DiFrancesco* specifically provides for appellate review of a sentence on the record of the sentencing court;

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[13] This was not done in Respondent's case.

the judge in *DiFrancesco* had a broad choice for sentencing, rather than the life or death alternative presented in *Bullington* and herein; and, the prosecution in *DiFrancesco* had the burden at the sentencing hearing of proving an additional fact only by a preponderance of the evidence, in contrast to the reasonable doubt standard used in *Bullington* and herein. 451 U.S., at 440-441, 101 S.Ct. at 1859.

Respondent notes a further factual distinction between the present case and *United States* v. *DiFrancesco, supra*, which appears to be of some significance. In *DiFrancesco*, the factual finding made by the trial court at the sentencing hearing was made in the state's favor, not the defendant's. "The District Court made findings of fact and ruled that respondent was a dangerous special offender within the meaning of the statute." 449 U.S., at 124, 101 S.Ct., at 430. Thus, *Difrancesco* was subject to the enhanced range of punishment provided for, and the statutory appeal by the state from the sentence imposed. In contrast, the factual findings of the trial court in the present case were in Respondent's favor. The trial court found that the state had not proved any facts which subjected Respondent to enhanced punishment. This factor seems to have had some bearing on the decision in *DiFrancesco*, for this Court offered the following hypothetical in explanation of the holding therein:

> Congress might have provided that a defendant *found to be a dangerous special offender* was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the court of appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. . . . No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.

449 U.S., at 142, 101 S.Ct., at 440 [Emphasis added.]

Respondent was not, at the initial sentencing hearing, "found to be" a person subject to the death penalty. Thus, a distinction not pointed out in *Bullington* becomes clear: In *DiFrancesco*, there was, in essence, a verdict of guilty as to the dangerous special offender allegation, and the state merely appealed from the sentence imposed after that verdict; in the present case there was a verdict of acquittal as to those facts which would allow imposition of the death penalty, and the state cross-appealed from that acquittal, not from the imposition of sentence.

Petitioner also goes to great lengths to make it appear that the Arizona sentencing procedure before the trial court is not as final as in *Bullington* v. *Missouri*, *supra*. Again, under close examination, Petitioner's argument does not hold up. Petitioner paints a picture of the Arizona death penalty appellate process which is designed to support the characterization of Arizona's capital sentencing hearing before the trial court as merely, "the beginning of a winnowing process where both the aggravation and the mitigation begin to take form." (Brief for Petitioner, p. 28). Such is not the case.

As Petitioner correctly notes, all cases in which the death penalty is imposed are automatically appealed to the Arizona Supreme Court.[14] Two extremely important facts which must not be forgotten, however, are that no appeal is required if a life sentence is imposed, and that the state may not appeal unless the defendant appeals. *State* v. *Rumsey*, 136 Ariz. at 173, 665 P.2d at 55 (footnote 10). The death penalty appeal process applies only to

[14] 17 A.R.S., Rules of Criminal Procedure, rule 31.2(6). Since the appeal from a death penalty is automatic, Petitioner's claim, at p. 29 of his brief, that the state can appeal a death sentence, is irrelevant.

death penalties. Petitioner seems to lose sight of this important fact early in his discussion of Arizona's death penalty appeal process. As Petitioner points out, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating evidence, but only in death penalty cases. "This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life." *State* v. *Rumsey*, 136 Ariz. at 174, 665 P.2d at 56. The Arizona Supreme Court does look at everything anew, but again, only on appeals from the death penalty. The Arizona Supreme Court has "never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty." *State* v. *Rumsey*, 136 Ariz. at 173, 665 P.2d at 55 (footnote omitted). Petitioner's statement that, "Because of this comprehensive review, the trial court sentencing in Arizona is not the final step" (Brief for Petitioner, pp. 27-28), clearly applies only to those cases in which the death penalty is imposed, not those in which the defendant receives life imprisonment, as Respondent did at his original sentencing.

Petitioner makes the claim that Arizona's death sentencing procedure is no different from the procedures for imposing other penalties in Arizona. (Brief for Petitioner, p. 30). This claim is contradicted by the facts. The two sentencing procedures are described in separate statutes.[15] The non-capital sentencing procedure differs in almost every significant way from the death penalty procedure: Although in a non-capital sentencing, certain aggravating factors are described which must be found in order for the court to exceed the "presumptive" sentence, those factors can include anything, "the court may deem

[15] A.R.S. §§ 13-702 and 13-703.

appropriate."[16] No notice by the state of the aggravating circumstances it intends to prove is required, as it is in death penalty cases. *State* v. *Ortiz*, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981). Unlike death penalty cases, no hearing is required at which the state undertakes the burden of proving anything in order to obtain a harsher sentence. As with most sentencings, the court in a non-capital case has a broad range of punishment from which to select. Aggravating factors at a non-capital sentencing need not be found beyond a reasonable doubt.

Since the Arizona death sentencing procedure differs so significantly from the non-capital procedure, it is irrelevant that Arizona does not consider a sentence imposed under the non-capital procedure to be an acquittal of a higher sentence. It is also irrelevant that the state may appeal from a sentence other than the statutory presumptive sentence, because that right to appeal does not apply to first degree murder cases.[17]

The Arizona death sentencing procedure resembles the procedure used in *Bullington* v. *Missouri*, *supra*, in every significant way. In some respects, the Arizona procedure even more closely resembles a trial than Missouri's. Thus, the Arizona Supreme Court was correct, after finding that the Arizona sentencing procedure resembles a trial, to apply the holding of *Bullington*, and preclude the increase of Respondent's original life sentence to death.

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[16] A.R.S. § 13-702(D).

[17] A.R.S. §§ 13-4032(6), 13-604, 13-701. It should also be noted that, contrary to Petitioner's statement at page 13 of his brief, the state does not have the right to appeal a sentence that is too lenient. The state may only appeal from a sentence other than the presumptive. The state may not appeal from a presumptive sentence, even if it is "too lenient."

POINT IV

The State Of Arizona Did Not Prove Its Case At The Original Sentencing Hearing.

As discussed above in Point II, the trial court did not make any factual findings in favor of the state in at the original sentencing proceeding. All of the findings, both in the trial court's special verdict, and in the imposition of a life sentence, were in favor of Respondent. Thus, unlike *United States* v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), there is no finding of guilt which may be reinstated.

Contrary to Petitioner's contention, in the present case the state was allowed to regroup and have another opportunity to prove its case at the second sentencing hearing. A completely new sentencing hearing was conducted and a new and altered special verdict was issued. (J.A. 75-124). At the new sentencing hearing, the state attempted once again to prove two aggravating circumstances, in addition to the "pecuniary gain" circumstance, which were clearly resolved against the state at the first proceeding. (J.A. 86-91). That is precisely the sort of occurrence against which the Double Jeopardy Clause was designed to protect.

POINT V

Bullington v. Missouri Should Not Be Overruled.

In *Bullington* v. *Missouri*, *supra*, this Court made a very clear distinction between the Missouri capital sentencing procedure and the sentencing procedures used in those cases in which the Court had previously declined to apply the Double Jeopardy Clause to the imposition of a sentence less than the maximum. The Court then declined to extend the reasoning of *Stroud* v. *United States*, *supra*, "to this very different situation."

451 U.S., at 446, 101 S.Ct., at 1862. *Bullington* does not, as Petitioner contends, obscure the difference between trials and sentencings. Rather, *Bullington* explains that the Missouri death penalty sentencing procedure is not simply the imposition of a sentence, but instead is a fact-finding procedure which amounts to a trial, at which the defendant was acquitted. As with any trial, an acquittal at that proceeding is made final by the provisions of the Double Jeopardy Clause. Although Respondent would agree that the mere *imposition* of sentence does not operate as an implied acquittal of any greater sentence, *Bullington* and the present case did not involve the mere imposition of sentence, but rather, as described above, involved a fact-finding trial at which there was an explicit acquittal of the death penalty.

Unlike most sentencings, the death penalty sentencing procedure in *Bullington* is designed to determine specific facts. The sentencing jury in *Bullington* was not allowed to simply use their unfettered discretion to impose whatever punishment they felt appropriate, selected from a broad range of penalties. If the necessary facts were proven, the defendant could receive the death penalty; if they were not proven, he could not receive it. As the dissent in *Bullington* points out, "Missouri has decided that death is an appropriate punishment for one whose guilt of murder *with aggravating circumstances* is made clear through special procedures." 451 U.S., at 453, 101 S.Ct., at 1865 (Powell, J., dissenting) (emphasis added). In Missouri, as in Arizona, guilt of first degree murder alone is not punishable by the death penalty.

The reasons for applying the Double Jeopardy Clause to trials on guilt or innocence apply equally to sentencing trials such as Missouri's and Arizona's. A retrial of a defendant on the death penalty proceeding certainly "enhance[s] the possibility that even though innocent, he

may be found guilty." *Green* v. *United States*, *supra*, at 188, 78 S.Ct., at 224. Unlike an ordinary sentencing decision, it cannot be said of the sentencing procedures at issue here that one sentencer's decision is as correct as the next. For instance, the aggravating circumstances which must be proven by the state in order to subject a defendant to the death penalty are objective facts which are either true or are not true.[18] Retrial of the death penalty proceeding increases the likelihood of an erroneous factual finding which will subject a defendant to the death penalty. A defendant should not be subjected to this risk. Even Petitioner concedes that the purpose of using the reasonable doubt standard herein is to require more credibility and reliability of the facts upon which the death sentence may rest. (Brief for Petitioner, pp. 28-29). As this Court stated, when the reasonable doubt standard is employed, it is ". . . 'designed to exclude as nearly as possible the likelihood of an erroneous judgment. . . . [O]ur society imposes almost the entire risk of error upon itself.' *Addison* v. *Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979)." *Bullington* v. *Missouri*, 451 U.S., at 441, 101 S.Ct., at 1859.

The Double Jeopardy Clause also protects a defendant against the embarassment, expense, ordeal, anxiety and insecurity which accompany repeated attempts to convict him of a particular offense. *Green* v. *United States*, *supra*, at 187-188, 78 S.Ct., at 223-224. This also applies equally to one acquitted of the death penalty in proceedings such as those at issue here. Hypothetically, assume a defendant is charged separately with Murder, first degree, and Shoplifting, a misdemeanor. He is convicted of the murder, but in a sentencing proceeding resembling a trial, is acquitted of those things required for the death

[18] Mo. Rev. Stat. § 565.012.2; A.R.S. § 13-703(F).

penalty. He is subsequently acquitted of the shoplifting charge. It hardly seems appropriate that the Double Jeopardy Clause would protect him from the embarrassment, expense, ordeal, anxiety and insecurity which would accompany a retrial of the Shoplifting charge, but not from those same evils which accompany a retrial on the factual issue of whether he can receive the death penalty. There can be no doubt that those evils would be present to a much greater degree in the latter situation.

The present case would be a most inappropriate one in which to overrule *Bullington* in any event, as the reasons for applying the Double Jeopardy Clause herein are even stronger than those in *Bullington*. The present case does not involve a retrial as *Bullington* did, therefore the "harsher sentence on retrial" rule of *Chaffin*, *Pearce*, and *Stroud*, does not apply here. Further, unlike the procedure in *Bullington*, the Arizona verdict discloses the court's factual findings even if a sentence of life is imposed, so it is more easily said here that the state failed to prove its case. Finally, the Arizona procedure does not permit the sentencer to be lenient and impose life even though the state has proven its case. All of these factors provide even more reason to apply the Double Jeopardy Clause to the present case than existed in *Bullington*.

The *Bullington* decision should not be overruled, and certainly not in this case. *Bullington* is not at odds with previous Double Jeopardy law, it simply recognizes that the reasoning of those cases which declined to afford Double Jeopardy Clause protection to sentencings does not apply when the sentence is determined through a fact-finding procedure which amounts to a trial.

CONCLUSION

The capital sentencing proceeding herein, like that in *Bullington*, resembled a trial on the issue of guilt or innocence. All factual issues at that hearing were resolved, by verdict, against the state. Respondent's acquittal of the death penalty was final under the Double Jeopardy Clause. The Arizona Supreme Court was therefore correct in setting aside his death penalty and reducing it to the original sentence of life.

Respectfully submitted,

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APPENDIX A

ARIZONA REVISED STATUTES

§ 13-703 Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F an G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. And presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials;

but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsecion F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall imposed a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Effective May 1, 1979